

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SHAWN EUGENE WIMBERLY,  
PETITIONER,

VS.

CIVIL NO: 05-40069  
CRIM NO: 93-CR-50028-4

UNITED STATES OF AMERICA,  
RESPONDENT.

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HON. PAUL V. GADOLA  
HON. STEVEN D. PEPE

**ORDER APPOINTING COUNSEL AND**  
**SETTING AN EVIDENTIARY HEARING**

Petitioner filed a “Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody” (hereinafter, “Motion under § 2255”) (Dkt. #593) on February 28, 2005. Petitioner has alleged that he requested that his trial counsel file a notice of appeal following his conviction and that his trial counsel failed to do so. The law of this circuit indicates that failure to file a notice of appeal, under certain circumstances, can constitute *per se* ineffective assistance of counsel.<sup>1</sup>

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<sup>1</sup>*Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) (holding that “the failure to perfect a direct appeal, in derogation of defendant’s actual request, is a *per se* violation of the Sixth Amendment”); *Carrion v. United States*, 107 Fed. Appx. 545, 547 (6th Cir. 2004) (in the case of a defendant who waived his right to appeal in a plea agreement, “counsel’s failure to file a notice of appeal as the defendant requested establishes ineffective assistance of counsel *per se*, irrespective of whether the appeal would be successful”). *See also Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2002) (“we have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable”).

More information than is currently contained in the record is needed in order to make a determination of facts relevant to a resolution of Petitioner's claim. These include, among others, the following:

1. Did Petitioner's counsel consult<sup>2</sup> with Petitioner about filing an appeal?
2. Did Petitioner ask his counsel to file a notice of appeal or instruct his counsel not to file an appeal?

The docket in this case shows that Petitioner's retained counsel was Ralph H. Richardson. The docket and current listing in the Directory for the State Bar of Michigan indicates his contact information as:

Stone & Richardson  
2910 E. Jefferson Avenue  
Detroit, MI 48207-4208  
313-393-6700  
Fax: (313) 393-6701  
Email: r\_richardson@comcast.net

Therefore, **IT IS ORDERED** that:

1. An evidentiary hearing will be held before the undersigned at 10:00 a.m. on Tuesday, May 15, 2007, at 600 Church Street, Flint, Michigan 48107, or such time as agreed to by counsel and my deputy courtroom clerk.
2. Pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings, counsel is appointed under 18 U.S.C. § 3006A for this evidentiary hearing. Petitioner is ordered to complete and return to the Court the CJA Form 23, Financial Affidavit, that will accompany his copy of this Order.

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<sup>2</sup> In this context, "consult" has a specific meaning: to "advise the defendant about the advantages and disadvantages of taking an appeal, and make a reasonable effort to discover the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. at 478. Counsel has a constitutionally imposed duty to "consult" with the defendant when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. at 480.

3. The parties shall appear at the evidentiary hearing and arrangements will be made to provide for Petitioner's presence.
4. All witnesses and material evidence relevant to the above-listed inquiries must be produced at this hearing.
5. The government shall make arrangements to assure the presence of Ralph H. Richardson whose testimony may be essential to a full development of the record.
6. Questions or concerns regarding these arrangements can be directed to my Deputy Clerk, Pete Peltier, at (810) 341-7850, or by mail at: Room 140, 600 Church Street, Flint, Michigan 48502.

Dated: April, 3, 2007  
Flint, Michigan

s/Steven D. Pepe

**Certificate of Service**

I hereby certify that on April, 3, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Mark C. Jones, AUSA, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Shawn Wimberly, #47720008, FCI- Elkton, P.O. Box 10, Lisbon, OH 44432, Federal Defender Office, 653 S. Saginaw St., Ste. 105, Flint, MI 48502

s/James P. Peltier  
Courtroom Deputy Clerk  
U.S. District Court  
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Flint, MI 48502  
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pete\_peltier@mied.uscourts.gov